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IN THE

Supreme Court of the United States

OCTOBER TERM, 1969

No. 856

CARL A. VERGARI, District Attorney of Westchester County, New York,

Petitioner,

—against—

208 CINEMA, INC. and PHILIP STEINBERG,

Respondents,

—and—

ERIC GELDART, Police Chief of the Village of Port Chester, New York,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR RESPONDENTS 208 CINEMA, INC. AND PHILIP STEINBERG IN OPPOSITION

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Opinions Below

The District Court opinion, by McLean, J., for the United States District Court for the Southern District of New York, is annexed to the petition for certiorari filed in this Court, Appendix, p. 16, and the order of the United States Court of Appeals for the Second Circuit, Appendix, p. 24.

Jurisdiction

Jurisdiction of this Court is invoked under 28 U.S.C. §1254(1).

Questions Presented

1. Whether the seizure of motion picture films by law enforcement officers without a prior adversary proceeding to determine whether or not such films are obscene, violates the First Amendment of the United States Constitution.

Statutes Involved

United States Constitution

First and Fourteenth Amendments

New York Penal Law, §§235.00, 235.05, 235.10 and 235.15

Statement of the Case

While petitioner has set forth the essential facts, it is important that certain corrections and additions be noted.

At no time were any of the films ever adjudicated to be obscene in any competent forum. Several of the films seized had, in fact, been exhibited across the country and in neighboring communities in the metropolitan New York area without incident. Thus petitioner's outright statement that the films seized were obscene is without any foundation.

Further, while two judges may have viewed some of the films before issuing search warrants, the execution of the warrant resulted in the seizing of additional films and

coming attractions that had never been viewed by the judges. In addition, at the time of the first seizure it is clear that the intent of the law enforcement officers was to prevent respondent from exhibiting any further films. The officers blatantly attempted to unbolt the camera and take it, but were unable to do so and, instead, seized the lenses of the camera.

Reasons for Not Granting the Writ

In view of the uniform interpretation of the Circuit Courts of Appeals that seizure of motion picture films without a prior adversary hearing is in violation of the First Amendment, there is no substantial issue or conflict in the Circuits to be resolved by this Court. Specifically, the Seventh Circuit, in *Metzger* v. *Pearcy,* 393 F.2d 202 (7 Cir., 1968), the Second Circuit, in *Bethview Amusement Corp.* v. *Cahn,* 416 F.2d 410 (2 Cir., 1969) and the Fourth Circuit in *Tyrone, Inc.* v. *Wilkinson,* 410 F.2d 639 (4 Cir., 1969), cert. den. —— U.S. ——, are all in accord that where a motion picture is seized from a commercial movie house there must be a prior adversarial hearing. In each instance the fact situations are similar to the case at bar. Therefore, the result in this case clearly follows the law as uniformly interpreted by the Courts of Appeals.

While the District Attorney seeks to provide his own interpretation as to the opinions of this Court, it is clear that each of the Circuits above mentioned has considered this argument and unanimously rejected it. The distinction advanced by petitioner between the seizure of a motion picture film as compared with a quantity of books is insignificant and of no merit.

Further, it is to be noted that this Court has already declined to take certiorari in *Tyrone* v. *Wilkinson*. It is therefore submitted that if certiorari were denied in that case, it should, likewise, be denied in this one since there is no meaningful distinction between the facts in *Tyrone* v. *Wilkinson* and the facts in the case at bar.

CONCLUSION

WHEREFORE, it is respectfully requested that the instant petition for certiorari to the United States Court of Appeals for the Second Circuit be denied.

Respectfully submitted,

MICHAEL J. KUNSTLER
WILLIAM M. KUNSTLER
STEVEN J. HYMAN

Attorneys for Respondents 208 Cinema, Inc. and Philip Steinberg

Dated: February 7, 1970

CERTIFICATE OF SERVICE

The undersigned, one of the attorneys for the respondents 208 Cinema, Inc. and Philip Steinberg, in the within action, hereby certifies that three copies of the within brief for respondents were this day mailed to Carl A. Vergari, District Attorney of Westchester County, New York.

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MICHAEL J. KUNSTLER

February 7, 1970